Supreme Court, U.S.
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No. 05-1581

IN THE

Supreme Court of the United States

CLIFFORD E. HOTTE,

Petitioner,

—v.—

USA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioner's constitutional rights, guaranteed by the Fifth and Sixth Amendments to the United States Constitution were violated, when the lower court held that prior to this Court's opinion in *United States v. Booker*, the term "prescribed statutory maximum," refereed to in the Rule of Apprendi, was a reference to the statutory maximum for the offense of conviction established by the Congress, rather than the maximum sentence permitted under the United States Sentencing Guidelines

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Dr. Clifford E. Hotte, respectfully prays that a Writ of Certiorari issue to review the Summary Order and Judgement of the United States Court of Appeals for the Second Circuit denying his petition for a Writ of Habeas Corpus.

OPINION BELOW

The "Summary Order" of the United States Court of Appeals for the Second Circuit in *Hotte v. United States*, 05-1752-pr, denying Petitioner's Writ of Habeas Corpus, issued pursuant to Rule 0.23 of the Local Rules of the Second Circuit Court of Appeals. The Summary Order is set out in the Appendix hereto as A-1 through A-3.

JURISDICTION

The Judgement of the Court of Appeals for the Second Circuit was entered on March 27, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be...deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides in relevant part that: "In all criminal prosecutions, the

accused shall enjoy the right to... be informed of the nature and cause of the accusation... against him... and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

In the fall of 1998, the Petitioner was convicted of securities fraud (in violation of 15 U.S.C. § 78[j]); mail fraud (in violation of 18 U.S.C. § 1341); wire fraud (in violation of 18 U.S.C. § 1343); and conspiracy to commit these offenses (in violation of 18 U.S.C. § 371). (A. 141-159) All counts of the Indictment having evolved from a single transaction.

A Judgment of Conviction was entered on November 16, 1998. On November 25, 1998, Petitioner appealed his conviction to the United States Court Of Appeals for the Second Circuit. On August 20, 1999 the Judgement of Conviction was affirmed. *(United States v. Hotte, 189 F.3d 462 [2d Cir. 1999]*). On September 3, 1999, a petition for rehearing, with suggestion for rehearing *en banc*, was filed with the Court of Appeals. That petition was denied on November 5, 1999. A petition for a Writ of Certiorari was thereafter filed with this Court. On June 29, 2000, this Court denied the petition for a Writ of Certiorari. (*Hotte v. United States, 530 U.S. 1274, 120 S. Ct. 2740, 147 L. Ed. 2d 1004 [2000]*).

On June 22, 2001, Petitioner timely filed for a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C.A. §2255, seeking the vacatur of his sentence by the District Court.

Approximately four years later, on February 1, 2005, the District Court (Johnson, J.) issued a Memorandum and Order denying Petitioner's motion for a Writ of Habeas Corpus.

Petitioner subsequently filed a motion seeking re-argument and re-consideration of the District Court's Order of February 1, 2005, and in the alternative, that the District Court

issue a Certificate of Appealability.

On March 29, 2005, the District Court issued a Memorandum and Order granting Petitioner's motion for reconsideration, but denying his Petition for a Writ of Habeas Corpus. However, the Court did grant Petitioner's application for a Certificate of Appealability.

On March 29, 2005, a Notice of Appeal was timely filed by the Petitioner with the District Court. An appeal of the District Court's Order was thereafter prosecuted before the United States Court of Appeals for the Second Circuit. By Summary Order entered on March 27, 2006, the Court of Appeals affirmed the decision of the District Court. (*Hotte v. United States, ___ F3d ___, 2006 U.S. App. LEXIS 8632 [2d Cir. 2006]*) On April 18, 2006, a Petition for Rehearing *En Banc*, pursuant to Rule 35(c) of the Federal Rules of Appellate Procedure, was filed with the Court of Appeals for the Second Circuit. That Petition was denied on May 21, 2006.

STATEMENT OF THE FACTS

The Petitioner, Dr. Clifford E. Hotte, was indicted for securities fraud in connection with Health Management, Inc. ("HMI, Inc."), a "small cap" public company engaged in the sale of pharmaceuticals that the Petitioner had founded in 1985. The first trial of the Petitioner commenced in December of 1997, and resulted in a hung jury. On April 6, 1998, the case was tried for a second time and the government was ultimately able to obtain a conviction. Following Petitioner's conviction, the United States Department of Probation prepared a Pre-Sentence Report ("PSR") to which Petitioner's counsel made timely and detailed objections. On November 16, 1998, the Petitioner was sentenced by the Hon. Sterling Johnson, Jr. (U.S.D.J., E.D.N.Y.).

As the record below shows, at the time of sentencing the

District Court was presented with the following factual circumstances. The defendant was a 51-year old first time non-violent offender, whom it had taken the government two trials to convict. Dr. Hotte had not only led an exemplary life up until his Indictment and subsequent conviction, but as the PSR confirmed, he was a dedicated family man who, prior to forming HMI, Inc. in 1985, had a distinguished academic career in radio-pharmacology. Dr. Hotte had held dual teaching appointments as a professor in radio- pharmaceutical science at Tufts Medical School and Northeastern University, and he later joined the faculty at the Stony Brook School of Medicine and served as the Director of the Nuclear Pharmacy at the University Hospital and Medical Center.

The Indictment upon which Dr. Hotte was tried merely charged the Petitioner with fraud, it did not contain any allegations with respect to the alleged amount of the fraud, nor was the jury asked to, nor did it make any findings as to the amount of any "loss" purportedly caused by the offense of conviction.

Since Dr. Hotte had never been charged with a crime before, his Criminal History Category was one. At a Base Offense Level of 6, the "statutory maximum" Guideline sentence authorized by the jury's verdict, called for a sentencing range of 0 to 6 months.

At the sentencing, however, the government argued that Petitioner's Base Offense Level of 6 should be "enhanced" by adding an additional 25 points. Accepting all of the government's arguments, and over the specific objections of defense counsel, the District Court raised Petitioner's Base Offense Level to 31, thereby causing a corresponding rise in Petitioner's Guideline sentencing range from 0 to 6 months to 108 to 135 months (or a minimum of 9 years and a maximum of 11¼ years).

After applying the full 25 points in enhancements, the

District Court sentenced the Petitioner to a term of imprisonment of 9 years, a fine of $250,000.00 dollars, restitution in the amount of $9,571,429.00 and a $700.00 special assessment.

At the sentencing proceeding, the Court added 2 points to Petitioner's Base Offense level because it found that the offense had "involved more than minimal planning," (USSG §2F1.1 [b][2][A]). It next added 4 points based upon its finding that Petitioner "directed the activities of at least five individuals at HMI," (USSG §3B1.1[A]). Finding that Petitioner "abused a position of public trust as President and CEO of HMI," the District Court added an additional 2 points (USSG §3B1.3). Finally, but certainly most significantly, the Sentencing Judge enhanced Petitioner's Base Offense Level by 17 more points, accepting the government's argument that the "amount of loss resulting from the instant offense [was] at least $60 million." (USSG §2F1.1 [b][1][R]).

At His Sentencing And On Direct Appeal, Petitioner Preserved His *Apprendi* Claims

Although Petitioner was sentenced on November 16, 1998, (approximately one year before this Court's decision in *Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215 [1999]* and two years before the Court's opinion in *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 [2000]*), appellant nonetheless (relying in principal part on the precursors to *Jones/Apprendi* - including the 1986 decision in *McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411 [1986]* and its progeny), objected to the fact; (1) that the amount of the loss had not been charged in the Indictment, and (2) that all sentencing enhancements (including the amount of the loss), were based upon judicial fact-finding, applying only a "preponderance of the evidence" standard of proof, rather than

by the petit jury applying a "beyond a reasonable doubt" standard of proof.

Furthermore, and once again even though Dr. Hotte's original Petition for a Writ of Certiorari was filed before this Court's decision in *Apprendi*, Dr. Hotte nonetheless argued in his petition to this Court, that his sentence violated both his Fifth and Sixth Amendment rights. As his original Petition stated:[1]

> The present case not only raises the direct issue of whether the procedures followed and adopted by the District Court at Petitioner's sentencing comported with Due Process, but implicate the far broader issues of what standards and requirements are constitutionally mandated in instances in which a defendant's sentence is substantially increased as the result of allegations concerning conduct neither proved nor found by a jury. When must factual allegations that hold the potential for increasing a defendant's sentence twenty fold - as in the case at bar - be found beyond a reasonable doubt by a petit jury.

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1. See, *United States v. Olis, 429 F.3d 540, 2005 U.S. App. LEXIS 23545 (5th Cir. 2005)*: "[A]lthough [the] defendant 'never explicitly mentioned the *Sixth Amendment*, Apprendi, or Blakely until his Rule 28(j) letter,' his objections during sentencing that the court's loss calculation had not been proven at trial adequately apprised the district court of a *Sixth Amendment* objection... his repeated objections also adequately apprised the court that he was raising a constitutional error with respect to the loss calculation..." (*Id. at 544-545*)

On the basis of the nature and substance of the objections that the Petitioner raised both at the time of his sentencing and on direct appeal, at oral argument of the appeal below the government expressly conceded that there had been no procedural default by the Petitioner, and that his *Apprendi* based claims had been adequately preserved for review.

The Rule of *Apprendi* Is Retroactively Applicable To Petitioner's Case Because *Apprendi* Was Decided Before Petitioner's Direct Appeals Were Final

The law is well settled that a case is not "final" until the later of the following events are complete; "the judgment of conviction was rendered, the availability of appeal exhausted, [or] the time for petition for certiorari had elapsed or a petition for certiorari finally denied..." *United States v. Johnson, 457 U.S. 537, 543, n.8,102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982).* Accord: *Allen v. Hardy, 478 U.S. 255, 257 n1, 106 S. Ct. 2878, 92 L. Ed. 2d 199 (1986); Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 622, n. 5 (1965); Green v. United States, 260 F.3d 78, 84 [2d Cir. 2001]*: "Green's conviction became final on October 21, 1996 when the United States Supreme Court denied his petition for a writ of certiorari;" *United States v. Leon, 203 F.3d 162, 163 (2d Cir. 2000)*: [Defendant's] conviction became final on February 24, 1997, when the Supreme Court denied his petition for a writ of certiorari.").

Insofar as Petitioner's appeals were not "final" at the time *Apprendi* was decided, *Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708 (1987)* and its progeny, require that the holding in *Apprendi* must be retroactively applied to Petitioner's case. As this Court explained the principal of

retroactivity announced in *Griffith*: "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases... pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."

Moreover, in the Summary Order issued by the Court of Appeals below, the Court expressly agreed that Petitioner had effectively preserved his *Apprendi* claim for review. "We agree with the district court that Apprendi is applicable to petitioner's case. As the [district] court correctly noted, petitioner's case was not final until three days after the Supreme Court's decision in Apprendi. Therefore, the Apprendi rule applies to petitioner's case. Griffith v. Kentucky, 479 U.S. 314, 322 (1987)." (A- 2)

REASONS FOR GRANTING THE PETITION

The Opinion of the Court of Appeals Violated the "Rule of Apprendi," And Thereby, Petitioner's Rights Guaranteed by the Fifth and Sixth Amendments. Further, it is in Conflict With Decisions of Other Courts of Appeals on the Same Important Matter

In *Apprendi*, this Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *(Id. 530 U.S. at 490)*

Nevertheless, following this Court's opinion in *Apprendi*, all of the Courts of Appeals eventually held that reference to the "prescribed statutory maximum" in *Apprendi*, was a reference to the maximum penalty established by the Congress for the offense of conviction and did not mean the maximum sentence that could be imposed under the mandatory United States

Sentencing Guidelines. As a result, all of the Courts of Appeals rejected the contention - raised by undoubtedly thousands of defendants - that *Apprendi* applied to Guideline sentences.

Of course by interpreting and construing the opinion in *Apprendi* in this manner, the Courts of Appeals functionally eviscerated the Sixth Amendment protections that the "Rule of Apprendi" was designed to effectuate, since it is has always been the law that any sentence that exceeded the maximum penalty established by Congress for a particular offense, was illegal and void *ab initio*.

Ultimately, in *Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)*, this Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id. at 303*)

Since the Petitioner was sentenced at a time when the United States Sentencing Guidelines were mandatory, the "statutory maximum" that applied was therefore not the maximum penalty imposed by the Congress for the offense of conviction - as the sentencing court otherwise believed - but rather the maximum sentence which the sentencing court was legally bound to impose under such mandatory Guidelines. As the Court in *United States v. Shamblin, 323 F. Supp. 2d 757, 766 (S.D. West Va. 2004)*[2] observed:

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2. *United States v. Shamblin, 323 F. Supp. 2d 757, 766 (S.D. West Va. 2004), vacated and remanded on different grd's, 153 Fed. Appx. 247, 2005 U.S. App. LEXIS 25336 (4th Cir. W. Va. 2005).*

> The overarching principle articulated in Apprendi is that compliance with the *Sixth Amendment* requires 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum to be proved beyond a reasonable doubt. *530 U.S. at 490.* The prescribed "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.' *Blakely, 2004 U.S. LEXIS 4573, 2004 WL 1402697 at *4.* The jury verdict alone - or the defendant's admission alone - "must authorize the sentence." *Id. 2004 U.S. LEXIS 4573, at *5, n.8.* **Therefore, the upper bound of the appropriate guideline range, based on facts proven to a jury beyond a reasonable doubt or admitted by the defendant, establishes the relevant statutory maximum for Apprendi purposes.**

As this Court further made clear in *Blakely*, when a defendant is subject to a mandatory sentencing scheme, the reference in the Rule of Apprendi to the "prescribed statutory maximum" - as that Rule was originally formulated and intended - was a reference to the maximum sentence to which a defendant was exposed under such a mandatory sentencing scheme. As the Court explained:

> In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by

> petitioner nor found by a jury. **The State nevertheless contends that there was no Apprendi violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in *§ 9A.20.021(1)(b)*.** It observes that no exceptional sentence may exceed that limit. See *§ 9.94A.420*. Our precedents make clear, however, that the "statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id. at 303*)
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> * * *
>
> **The "maximum sentence" is no more 10 years here than it was 20 years in Apprendi (because that is what the judge could have imposed upon finding a hate crime) or death in Ring (because that is what the judge could have imposed upon finding an aggravator).** (*Id. at 304*)
>
> **Petitioner was sentenced to prison for more than three years beyond what the law allowed** for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." (Id. at 313, emphasis supplied)

Against this background, the decision by the Court of Appeals in the instant case is simply irreconcilable. Most respectfully, by March of 2006, it should have been readily apparent, that insofar as Petitioner was sentenced under a mandatory sentencing scheme, the statutory maximum authorized by "the

facts reflected in the jury's verdict," was the maximum sentence established by the Guidelines, not the maximum set by the legislature. As previously noted, in the present case that would have been a sentence of 0 to 6 months, based upon a Base Offense Level of 6.

Nevertheless, in its Summary Order, the Court of Appeals held that the "statutory maximum" which governed was not the Guideline maximum, but rather the maximum penalty prescribed for the offense of conviction by Congress. As the Court wrote: "[T]he Apprendi rule applies to petitioner's case... [n]evertheless, petitioner's claim fails on the merits. **Petitioner was sentenced to 108 months, below the statutory maximum for his offense at the time of petitioner's trial. Apprendi stands only for the proposition that a defendant's sentence cannot be increased beyond the statutory maximum by facts not found by a jury.**" (A-2, emphasis supplied)[3]

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3. The panel also noted that: "To the extent that petitioner claims that the U.S. Sentencing Guidelines themselves are unconstitutional or that the enhancements used to calculate his sentence under the Guidelines were unconstitutionally imposed, those claims must be made under United States v. Booker, 543 U.S. 220 (2005), and we have held that Booker does not apply to cases on collateral review that became final before the Booker decision was handed down. Guzman v. United States, 404 F.3d 139 (2d Cir. 2005)." However, the Petitioner never made any such argument on appeal. As expressly stated in his opening brief to the Court below: "Petitioner's emphasizes - and this is a matter of central importance to the analysis of the present appeal - that he specifically does not seek to have this Court retroactively apply the holdings of either Blakely or Booker to his case. His appeal is based solely upon the claim -

Unfortunately, the Court of Appeals did not edify its reasoning for reaching this conclusion. However at oral argument, the Court asked counsel whether he was really taking the position that the Second Circuit Court of Appeals, as well as its sister Courts of Appeals, had somehow gotten it wrong when they had previously held that the reference to the "statutory maximum" was a reference to the maximum penalty established by Congress. Although counsel responded that the clarification of the Rule of Apprendi in *Blakely* appeared to confirm that the Courts of Appeals had indeed misinterpreted the terms "prescribed statutory maximum," it is apparent from the Court's decision, that it did not agree. See however, *United States v. Leahy, 438 F.3d 328 (3d Cir. 2006*, McKee J. dissenting on other grd's.): "The majority finds some comfort in being able to 'join[] the Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits' in holding 'that Booker does not apply to orders of restitution under the MVRA and VWPA.' Maj. Op. at 18. **However, before Booker was decided, one could have developed an even more impressive list of the courts that had incorrectly concluded that Apprendi does not apply to the federal sentencing guidelines.**" (*Id. at 345*, emphasis supplied).

Nonetheless, as the Summary Order confirms, the Court of Appeals presently maintains the position that prior to this Court's holding in *Booker*, it was somehow the proper application of the Rule of Apprendi to construe the reference to

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and for the reasons set forth above - that he is entitled to relief because the Rule of Apprendi is retroactively applicable to his case. His case does not depend, in any way, upon the application of any 'new rules of criminal procedure' established for the first time in either Blakely or Booker." (petitioner's opening brief at p. 25)

the "prescribed statutory maximum," as a reference to the maximum penalty established by the Congress.

Most respectfully, it is difficult to understand how the Court of Appeals could reach this conclusion. Quite clearly the constitutional proscription against the imposition of a sentence which exceeds the "prescribed statutory maximum" based upon judicial fact finding, is a principle established by *Apprendi*, not *Blakely* or *Booker*. Similarly, the phrase "prescribed statutory maximum," is a phrase from *Apprendi*, not from *Blakely* or *Booker*. Those decisions merely clarified what this phrase meant. Those decisions explained that the reference in *Apprendi* to the "prescribed maximum sentence" was reference to the sentence a judge was legally obligated to impose under the law. Perforce, when the Guidelines were mandatory, a judge had to impose the sentence called for in the Guidelines. As the Court observed in *Booker*: "While subsection (a) of *§ 3553* of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, **subsection (b) directs that the court 'shall impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases. Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.**" (*Id. at 233-234*, emphasis supplied)

Further, the issue in *Blakely* and *Booker* was not the meaning of "prescribed statutory maximum." Rather, *Blakely* and *Booker* turned on the issue of whether a mandatory guideline sentencing scheme, which operated to increase the threshold sentence authorized by the verdict of the petit jury - by the application of mandatory judicial fact finding - comported with the jury trial guarantee of the Sixth Amendment.

There is no suggestion in either *Blakely* or *Booker* that the "prescribed statutory maximum," meant anything other than the

Guideline sentence authorized by the jury verdict, without resort to any enhancements based upon judicial fact finding.

While it seems clear that the use of the term "statutory maximum" in *Apprendi*, led the Courts of Appeals to conclude that the reference was to the legislative "statutory maximum," it is significant to note that this Court expressly rejected the government's argument in *Booker*, that because the Court in *Apprendi* used the word "statutory" maximum, that it was, *a fortiori*, a reference to the statutory maximum established by the legislature - and not to the Guideline maximum. As Justice Stevens explained: "The Government correctly notes that in *Apprendi* we referred to "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . .'" Brief for United States 15 (quoting *Apprendi, 530 U.S., at 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348...* **The simple answer, of course, is that we were only considering a statute in that case... [i]t was therefore appropriate to state the rule in that case in terms of a 'statutory maximum...'** (*Id. at 238*, emphasis supplied)

Blakely and *Booker* necessarily had to be based upon the premise that the Guidelines were unconstitutional because mandatory judicial fact finding operated to raise the mandatory maximum Guideline sentence, not the legislative maximum. If it were otherwise, then every general verdict by a jury would have authorized any sentence up to the maximum established by the Congress, and no constitutional violation would have occurred. As Mr. Justice Stevens observed in what has come to be referred to as the "substantive" portion of the *Booker* decision:

> **At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case,**

> **there would be no Apprendi problem.** Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. **In those instances, the judge is bound to impose a sentence within the Guidelines range.** (*Id. at 234, emphasis supplied*)

An examination of the Summary Order nonetheless compels the conclusion that it is the view of the Court of Appeals, that pre-*Booker*, this Court intended the reference in *Apprendi* to the "prescribed statutory maximum," to be a reference to the legislative maximum, but - and inexplicitly - that somehow post-*Booker* the phrase is properly understood to be a reference to the Guideline maximum. Most respectfully, there is nothing in either *Blakely* or *Booker* that the Court of Appeals could possibly have relied upon to reach that conclusion. Axiomatically, the *sine qua non* of both of these decisions was that the Sixth Amendment was offended because mandatory judicial fact finding was used to raise a defendant's Guideline maximum.

Petitioner below further explained that the clarification of the Rule of Apprendi in *Blakely* - later reiterated in *Booker* - did not establish any "new rule of criminal procedure" which might otherwise be subject to the proscriptions against retroactive application established in *Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).*

As an initial proposition, the Second Circuit Court of Appeals has never held that *Blakely* established a new rule of criminal procedure. Second, to the extent that *Blakely* (and/or *Booker*) established any "new rules" - and most courts have

reached the conclusion that *Blakely* did not establish any new rule of federal criminal procedure - such "new rule" was that determinate sentencing schemes that required mandatory judicial fact finding were unconstitutional. As noted, Petitioner made no claim that he was entitled to relief because the Federal Sentencing Guidelines were unconstitutional, but rather that he was entitled to relief solely because the sentencing court had violated the Rule of Apprendi by applying judicial fact finding to increase the sentence otherwise authorized by the facts found by the petit jury. *(Id. 530 U.S. at 490)*

Petitioner's contention that *Blakely* merely explained the *Rule of Apprendi*, and was not the announcement of any new rule of criminal procedure, appears to be confirmed by the comments of the various Justices of this Court. As Mr. Justice Scalia observed; "this case requires us to apply the rule we expressed in [*Apprendi*]." Justice Stevens stated that *Apprendi* and its progeny made clear the construction of the Sixth Amendment in *Blakely*. Dissenting, Justice Breyer emphasized that "*Blakely* purports to follow, not to extend *Apprendi*." Judge O'Connor observed in her dissenting opinion in *Blakely*, that: "Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy. And, despite the fact that we hold in *Schriro v Summerlin, 542 U.S. 348, 159 L. Ed. 2d 442, 124 S. Ct. 2519*, that Ring (and a fortiori Apprendi) does not apply retroactively on habeas review, **all criminal sentences imposed under the federal and state guidelines since Apprendi was decided in 2000 arguably remain open to collateral attack**." (*Id. at 323-324*, emphasis supplied).

The United States Court of Appeals for the Fourth Circuit, sitting *en banc* in *United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004)*, similarly reached the conclusion that *Blakely* merely explained the *Rule of Apprendi*, and did not modify or amend it:

> **On close examination of *Blakely*, we conclude that the Supreme Court simply applied--and did not modify--the rule articulated in *Apprendi*.** (Id at 345, Chief Judge Wilkins writing the opinion for the Court)
>
> * * *
>
> [T]he Blakely Court carefully explained that it did not 'redefine' the term 'statutory maximum,' but simply 'applied' the Apprendi understanding of that term... the Blakely Court noted that the definition was the one 'made clear' by 'our precedents,' citing Apprendi and its progeny, Ring and Harris... That the courts of appeals, including this one in Kinter, misinterpreted the meaning of 'statutory maximum' as used in Apprendi by construing it too narrowly, of course, sheds no light on the correct interpretation of the term in Apprendi. Rather, we must take the Supreme Court at its word -- that in Blakely it 'applied' Apprendi, setting forth the meaning of 'statutory maximum' as that term was used in Apprendi. (*Id. at 132-133*, Motz, J., dissenting on other grd's, emphasis supplied)

Accord see, *Carmona v. United States, 390 F.3d 200 (2d Cir. 2004)*: "**Supreme Court has not, in any other case, announced Blakely to be a new rule of constitutional law**... The Blakely Court specifically stated that Blakely was a decision applying the rule articulated in Apprendi v. New Jersey, (citations omitted). Apprendi held that the rule that 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt,' *Apprendi, 530 U.S. at 490*, is not

a new rule of constitutional law. Id. Logically, therefore, **the Supreme Court has not stated an intent to hold Blakely to be a new rule of constitutional law**; *United States v. Crosby, 397 F.3d 103 (2d. Cir. 2005)* ("It is readily apparent to us that a sentence imposed prior to Booker/Fanfan was imposed without an understanding of sentencing law **as subsequently explained** by the Supreme Court."); *United States v. Messino, 382 F.3d 704, 707 (7th Cir. 2004)*("Blakely and Booker **explain** that 'the statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."); *United States v. Pirani, ___F. 3d ___, 2004 U.S. App. LEXIS 16117, *34-*35 (8th Cir. 2004)* ("Properly viewed, *Blakely*... recasts our understanding of the *Apprendi* rule by clarifying the meaning of the phrase 'statutory maximum;" *Orchard v. United States, 332 F. Supp. 2d 275, 277 (D. Maine 2004)*:"The Blakely opinion **explains** that its holding is an application of the rule expressed in *Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*;" *United States v. Burton, ___ F. Supp.2d ___, 2004 U.S. Dist. LEXIS 15417, *19 (E.D. Pa. 2004)*:"The Supreme Court in *Blakely* **explained** that the '[s]tatutory maximum' for *Apprendi* purposes is the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant;" *United States v. West, 392 F.3d 450, 459-460 (D.D.C. 2004)*("In *Blakely* the Supreme Court applied Apprendi to a state sentencing guidelines scheme, **and explained that**, in that context, 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'"); *Patterson v. United States, ___ F. Supp. 2d ___, 2004 U.S. Dist. LEXIS 12402 *4 n.3 (E.D. Mich. 2004)* ("*Blakely* is in fact an extension of the rule announced in Apprendi v. New Jersey, 530 U.S. 466, 147

L. Ed. 2d 435, 120 S. Ct. 2348 (2000)."); *United States v. Shamblin, 323 F. Supp. 2d 757, 763 (S.D. West Va. 2004)* ("Thus, the rule of Apprendi, as explained in Ring and now Blakely, establishes that any fact 'legally essential to the punishment' must be proven beyond a reasonable doubt to a jury or admitted by the defendant.")

As a final observation, the circumstances at bar are analogous to those presented in *United States v. Bousley, 523 U.S. 614, 118 S. Ct. 1604 (1998)*. In *Bousley*, this Court explained that simply because the Court published a decision that shows that the lower federal courts had uniformly misconstrued a particular legal principle, that does not create a "new rule of criminal procedure." As the Court held in Bousley:

> This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague v. Lane (citations omitted)*, because our decision in *Bailey v. United States, (citations omitted)* did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that *42 U.S.C. § 1981* had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union (citations omitted)*. Our comment on the significance of the pre-Patterson jurisprudence applies equally to the pre-Bailey cases construing § 924(c): Patterson did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were

incorrect... (*Id.* at 625-626)

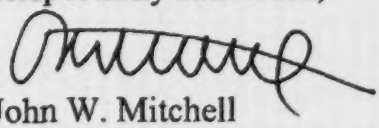
Most respectfully, like *Bousley* and *Patterson*, *Blakely* merely explained that the prior interpretation applied by the Courts of Appeals to the *Rule of Apprendi*, was incorrect. In so doing, *Blakely* did not create any "new rule of criminal procedure."

Conclusion

For the reasons set forth above, it is respectfully asserted that the United States Court of Appeals for the Second Circuit erred, when it held in its Summary Order, that because Petitioner's sentence had not exceeded the maximum established for the offense of conviction by Congress, the Rule of Apprendi was not offended. As a result, the Petitioner was deprived of his Constitutional rights guaranteed by the Fifth and Sixth Amendments. Further, the Decision by the Court of Appeals is in conflict with the decisions of other Courts of Appeals and the Rule of Law set by this Court.

Accordingly, this Court should issue a Writ of Certiorari to the United Stated Court of Appeals for the Second Circuit.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 27th day of March, two thousand and six.

PRESENT:
John M. Walker, Jr.,
Chief Judge,
Hon. Richard J. Cardamon,
Hon. Sonia Sotomayor,
Circuit Judges.

CLIFFORD E. HOTTE,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

APPEARING FOR APPELLANT-PETITIONER:
JOHN W. MITCHELL, New York, New York

APPEARING FOR RESPONDENT- APPELLEE:
EMILY BERGER, Assistant United States Attorney (Roslynn R. Mauskopf), United States Attorney for the Eastern District of New York, Susan Corkery, Assistant United States Attorney, (on the brief), Brooklyn, New York.

Appeal from the United States District Court for the Eastern District of New York.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court be and it hereby is AFFIRMED.

Petitioner-appellant Hotte appeals the district court's (Sterling Johnson, Jr., February 1, 2005, denial of his 28 U.S.C. § 2255 motion to vacate his sentence for securities fraud, mail fraud, and wire fraud. The district court denied relief, holding that, while Apprendi v. New Jersey, 530 U.S. 466 (2000), was applicable to his case, petitioner's claim failed on the merits. We assume familiarity with the facts and procedural history of this case.

We agree with the district court that Apprendi is applicable to petitioner's case. As the court correctly noted, petitioner's case was not final until three days after the Supreme Court's decision in Apprendi. Therefore, the Apprendi rule applies to petitioner's case. Griffith v. Kentucky, 479 U.S. 314, 322 (1987). Nevertheless, petitioner's claim fails on the merits. Petitioner was sentenced to 108 months, below the statutory

maximum for his offense at the time of petitioner's trial. Apprendi stands only for the proposition that a defendant's sentence cannot be increased beyond the statutory maximum by facts not found by a jury. To the extent that petitioner claims that the U.S. Sentencing Guidelines themselves are unconstitutional or that the enhancements used to calculate his sentence under the Guidelines were unconstitutionally imposed, those claims must be made under United States v. Booker, 543 U.S. 220 (2005), and we have held that Booker does not apply to cases on collateral review that became final before the Booker decision was handed down. Guzman v. United States, 404 F.3d 139, 141 (2d Cir. 2005).

In his motion for reconsideration under Fed R. Civ. P. 60(b), petitioner argued for the first time that the restitution of more than $9.5 million that he was required to pay was illegally imposed under 18 U.S.C. § 3663A because it failed to identify specific victims he defrauded. However, this circuit has held that challenges to restitution orders are not cognizable on a § 2255 motion to vacate, even when joined with other cognizable claims. Kaminski v. United States, 339 F.3d 84, 89 (2d Cir. 2003) .This court left open the possibility that a § 2255 motion may be appro iate where the petitioner alleges that the restitution order is so burdensome that it amounts to a restraint on the petitioner's liberty, see id. at 87. Even if we were to consider petitioner's argument that his restitution order amounts to a restraint on his liberty, an argument raised for the first time in his letter brief, petitioner failed to raise this argument on direct review. His challenge in the district court and before this court on direct review concerned only the amount of the restitution order. Because petitioner failed to preserve the issue on direct review, it is not a cognizable ground for § 2255 relief absent a showing of cause and prejudice. See Fountain v. United States, 357 F.3d 250, 254 (2d Cir. 2004). Petitioner

offers no reason that his belated objections to the restitution order could not have been raised on direct review. He is therefore barred from asserting such a challenge now.

We furthermore decline to treat petitioner's § 2255 motion as a motion for a writ of coram nobis. If petitioner wishes to pursue such a remedy, he should file a proper motion with the district court in the first instance. See Kaminiski, 339 F.3d at 89-91 (opinion of Calabresi, J.).

We have considered petitioner's remaining contentions and find them without merit. For the reasons set forth above, the judgment of the District Court for the Eastern District of New York is hereby AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

Lucille Carr, Deputy Clerk